Yaohan U.S.A. Corporation *and* Local 1245, United Food and Commercial Workers International Union, AFL–CIO. Cases 22–CA–19703 and 22–CA–19844

October 25, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On July 18, 1995, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision[1] and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

[1] The value of a bottle of soy sauce which employee Abraham Martinez allegedly attempted to steal is reported variously in the judge's decision to have been $1.99 or $2.99. Because we adopt, infra, the judge's finding that the allegation of theft was a sham, we need not resolve this discrepancy.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

With respect to the specific exception that the judge erred in crediting employee Chacon's prehearing affidavit over his testimony at the hearing, we note that this action is within settled Board precedent. See *St. John Trucking*, 303 NLRB 723 (1991); *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

Further, and for the reasons explicated in the judge's decision, we affirm the judge's refusal to provide a Spanish language interpreter at the hearing for Chacon. There is no evidence that a translator was requested for Chacon prior to the hearing. In contrast, a translator was available at the hearing to assist witness Jung Ho Kim. Chacon did not request an interpreter until after he became flustered in the middle of his examination by questions about discrepancies between the testimony he was then giving and his pretrial affidavit. We conclude that the General Counsel gave due consideration to the competence of the witnesses to testify in English and that, prior to the trial, neither the General Counsel nor any party doubted Chacon's competency to do so. Thus, we find no merit in the Respondent's exception to the judge's crediting Chacon's affidavit over his testimony at the trial.

We also deny the Respondent's exception to the judge's ruling permitting the General Counsel to question Jung Ho Kim in English and require him to respond in English. Kim testified regarding the discharge of employee Martinez, allegedly for attempting to steal a bottle of soy sauce. As we have already noted, a translator was present at the hearing and assisted Kim except for a very brief period at the end of his appearance when the judge permitted the questioning of Kim in English because ''some of the testimony that we heard is both in English and Korean.'' The Respondent contends that the administrative law judge improperly considered Kim's English-language testimony in discrediting Kim. In this regard, the Respondent asserts that the testimony shows that ''Kim did not understand the concept of [a] union.'' The record, however, shows that he did. During his translator-aided testimony, Kim testified about his knowledge of union activity at the Respondent's facility and his observation of employee Martinez talking with employees in the cafeteria about the Union. It is clear that the judge relied on the translator-aided testimony to discredit Kim's testimony regarding Martinez' alleged theft and to determine the issue on the merits.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Yaohan U.S.A. Corporation, Edgewater, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Bernard S. Mintz, Esq., for the General Counsel.
Kenneth D. Sulzer, Esq. (Seyfarth, Shaw, Fairweather & Geraldson, Esqs.), for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried before me on May 1, 1995, in Newark, New Jersey. The consolidated complaint alleges that Yaohan U.S.A. Corporation (Yaohan or Respondent) solicited employees to sign a petition to decertify the Charging Union, Local 1245, United Food and Commercial Workers International Union, AFL–CIO (Local 1245 or the Union), and impliedly threatened employees with discharge if they refused to sign a petition to decertify Local 1245 as the collective-bargaining representative of its employees, in violation of Section 8(a)(1) of the Act. The consolidated complaint also alleges the discriminatory discharge of employee Abraham Martinez because he supported Local 1245, in violation of Section 8(a)(1) and (3) of the Act. Respondent filed an answer denying the alleged violations.

The parties were provided full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Posttrial briefs have been filed by counsel for the General Counsel and Respondent and they have been carefully considered. On the entire record in the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all times material Respondent, a corporation with an office and place of business in Edgewater, New Jersey (the Edgewater facility), has been engaged in the operation of a retail specialty store. During the preceding 12 months, Respondent, in conducting its business operations described, derived revenues in excess of $500,000. During the same period of time, Respondent, in conducting its business operations described, purchased and received at its Edgewater facility products, goods, and materials valued in excess of $5000 directly from points outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7)

of the Act. The Respondent admits, and I find, that Local 1245 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Local 1245 is one of a number of local unions, all affiliated with United Food and Commercial Workers International Union, AFL–CIO which has jointly represented the employees of Respondent following a voluntary recognition of the International Union at retail grocery and merchandise stores located at various locations in the United States, including the Los Angeles area of southern California, the northern Illinois area of Arlington Heights and Chicago, as well as the Edgewater, New Jersey facility. The various affiliated Locals and Respondent had created a multistore, multistate bargaining unit consisting of the employees employed in those stores and which was the unit set forth in the parties' most recent collective-bargaining agreement, which expired on or about September 30, 1993.

In spite of the foregoing, sometime after its expiration an RD petition in Case 29–RD–1097 was filed on February 14, 1994, by an Edgewater employee named Richard Saco covering the employees employed in the Edgewater facility. At the same time, RD petitions were each filed on the same dates by individual employees for the Arlington Heights, Illinois store, naming affiliated Local 1540 as the bargaining agent in Case 13–RD–2061, and for the Los Angeles, California and other nearby stores, in Case 21–RD–2530, naming affiliated Locals 324, 551, 770, 905, and 1245 as the bargaining agents. Each of these petitions was dismissed by the respective Regional Offices because the units described, in each petition, limited to the respective store or stores listed, were not coextensive with the recognized nationwide unit. The petition in Case 29–RD–1097, was dismissed on May 6, 1994, and the dismissal was affirmed by the Board, following appeal, on December 22, 1994.

The allegations in the instant consolidated complaint involve alleged respondent unlawful conduct in soliciting and threatening employees, to induce them to sign and support the Edgewater decertification petition, and in firing an employee who openly advocated, against the petition, the employer's role in soliciting for it, and in support of the Union.

B. *The Evidence of Employer Solicitations and Threats in Support of the Decertification Petition*

Alan Jimenez was an employee of Yaohan at the Edgewater facility from August 1991 until his termination in February 1994. He had started as a cashier, then was transferred to boxboy and then stock person. Jimenez had an argument near the end of January 1994[1] with Store Manager Kudo who had denied him the opportunity to train on new store registers. Jimenez who had been asked to be trained on the register by an assistant manager, told Kudo he shouldn't be called in to fill in as needed on the registers if he couldn't be trained on them. Jimenez went upstairs at the facility to see Personnel Manager Felix Gonzalez to find out how far he could take his refusal to perform certain tasks.

In the office with Gonzalez was Assistant Personnel Manager Hilda Solari. Solari told him to stay out of trouble, he had to do whatever he was told to do. Jimenez asked her if under the union contract he could refuse anything and just how much protection he would be afforded. Solari told him the Union couldn't do ''shit'' for him. She added that the Union couldn't do anything for him and the California stores in Yaohan had gotten rid of the Union. Felix Gonzalez said if they did get rid of the Union it would have been like getting an automatic raise because the union dues would no longer have to be paid. Solari told him that the union dues were going up $4.50 a month. At that time they were $15 a month.

Solari made a comment that the decision was ultimately Yaohan's and the Union couldn't step in and do anything once Yaohan decided to do something. So they would be better off without the Union. They had gotten the benefits they had prior to the Union being in the Company, and regardless whether the Union was there they could revoke those benefits at any time. When both Solari and Gonzalez repeated their statements about the employees being better off without the Union, Jimenez asked how they could go about getting rid of the Union. Solari said they needed 30 percent of the signatures from the store employees. Solari told him there were 75 employees, and all they needed was 30–35 percent and not a majority of the signatures.

The next day, a Friday, Jimenez came to work at 4 p.m. Several employees asked him if he knew anything about a list that was being passed around to get rid of the Union. Several employees also told him there had been a list earlier that morning but it had been ripped up by someone and now they had a new list going around and they asked if he could tell them anything about it. Jimenez didn't know anything.

While at work that day Jimenez sought out a more senior employee, Santos Chacon, to obtain a price for new merchandise which he needed. He learned Chacon was not on the retail level but was upstairs. Jimenez went to the office and found Chacon, along with employee Elizabeth Guzman, Felix Gonzalez, and Hilda Solari.

As he entered Jimenez heard Solari tell Chacon that she had the list to get rid of the Union at a table and she asked him to sign it. Santos wasn't too sure whether he should sign or not. Solari reminded him that there had been a period of time when he, Chacon, had no green card before his permanent card arrived, yet the Company, which could have fired him after 3 days, chose instead to cover up for him so he could continue his employment. Again, she asked him to sign the list. The two managers stepped out of the room. Santos asked Jimenez what he should do.

Jimenez said he had spoken to the union representative and learned that the dues were going up only 25 cents a week, or a dollar a month, and the Local had no knowledge that the California branch of Yaohan had gotten rid of the Union. Jimenez told Chacon to be careful, think about it and discuss it with someone first, Jimenez recalled seeing the list in the office that day, containing a heading with words to the effect that the employees did not want the Union to be involved with negotiations for a new contract.

After a short time, Gonzalez and Solari returned to the office. A Korean employee, nicknamed Mr. Rich Man, now walked in and Solari asked him to sign the list. The employee asked whether it was for a raise in a joking manner.

[1] All dates shall hereinafter refer to 1994, unless otherwise noted.

The two managers laughed with him. He signed, asked if he could be fired for this and Solari told him no. Solari again asked Jimenez and Chacon if they were going to sign the list. Jimenez confronted her with what he had been told by the Union about the limited raise in dues and the Union's continuing status as representative in California. Solari turned to Gonzalez and said, ''Oh, here's another person that the union is telling bullshit to.'' Gonzalez said, ''just forget about them,'' referring to Jimenez and Chacon, grabbed the list, and walked to his office. Jimenez and Chacon went back to work.

During the first week of February, Jimenez and another employee, Omar Murrieta, went to the office a few minutes before starting work at 4 p.m. to speak to Gonzalez about work-related matters. During their conversation, Murrieta asked what happened to the list to get rid of the Union. Gonzalez said it was still circulating. He said the employees needed 30–35 percent of signatures. He then said again that getting rid of the Union was like getting an automatic raise. ''We'd probably be better off without the Union if we wouldn't have to worry about the benefits since we had them before the Union'' and he didn't see any reason why they would be revoked. If the Company really wanted to revoke them it could do it whether the Union was there or not. Gonzalez also noted the union dues were going up. When Jimenez now told him what Union Representative John Triccoli had told him about the union dues increase and its status in the California stores, Gonzalez got upset and told them to go back to work. Jimenez left and learned later from Murrieta that he had stayed a while longer to talk with Gonzalez.

During his cross-examination, Jimenez disclosed that he had filed an unfair labor practice charge over his discharge which he later withdrew voluntarily. He also believed that Manager Kudo treated employees unfairly, without respect and had a very heated argument with him regarding Kudo's refusal to permit Jimenez to receive training on the new register. Jimenez had also told Gonzalez to his face that he was an asshole in criticism of his active solicitation of employee support for the decertification petition. Jimenez voiced his opinion that what Gonzalez was doing wasn't right, that the ends did not justify the means and he, Gonzalez, could have gone about it in a totally different way where he could have been willing to support him. His attitude toward Gonzalez reflected his view of him as a boss. As a person he treated Gonzalez with respect. But Jimenez denied he was angry when he was terminated, he wasn't comfortable at Yaohan anymore, and wasn't very upset when handed his termination notice.

While I permitted the line of cross-examination involving Jimenez' attitudes and expressions of anger regarding various respondent supervisors, for the purpose of aiding in determining his credibility as a witness, I refused to permit Respondent to review an affidavit submitted by Jimenez to the Board after his own separation dealing exclusively with his discharge and his own charge on the ground it was not relevant to his direct examination nor to matters raised by the pleadings (Tr. 79). As to inquiry as to those matters, I determined in my discretion that such inquiry was not sufficiently related or relevant to the issues in this proceeding, including the witnesses' credibility, to permit extended cross-examination of them.

Santos Chacon, another witness called pursuant to subpoena by counsel for the General Counsel, turned out to be uncooperative and hostile and unwilling to affirm the statements he had previously sworn to contained in an affidavit he had provided Board Attorney Mintz on March 8. Chacon acknowledged having read the affidavit prior to signing it under oath. He also initialed corrections appearing on three of its pages. Chacon was able to read portions of the affidavit in English and answer in English the questions posed to him by counsel for General Counsel Mintz as I noted on the record (Tr. 139).

The affidavit was received in evidence, and in my judgment far more accurately reflects the events and statements it recounts than the evasions, contradictions, and feigned denials that Chacon provided at the hearing. Accordingly, I credit the statements contained therein over Chacon's denials as probative evidence in this proceeding. *Alvin J. Bart & Co.*, 236 NLRB 242–244 (1978). In this connection it is noted that in testimony the General Counsel offered in rebuttal, Jimenez testified that during the week preceding Chacon's taking the witness stand in this proceeding, he had four different conversations with him, one during a call Chacon made to his home, and others earlier in the same day they both testified, in which Chacon said he was afraid of the consequences of his being at the hearing, afraid of what Yaohan is going to do with him since he is afraid of putting his livelihood in jeopardy, afraid of reprisals from Yaohan, getting fired, management giving him a hard time or nit picking until they find something which would substantiate his discharge. In these conversations he asked Jimenez what he should do. I also note the corroboration of the statements contained in Chacon's affidavit provided by witness Jimenez. *St. John's Trucking*, 303 NLRB 723 (1991).

The credited statements contained in Chacon's affidavit are summarized as follows:

After signing a petition to get rid of the Union on Friday, January 28, at the request of employee Richard Saco, he was paged later that day to go to the office to see Gonzalez and Solari after learning that the original petition had been ripped. In the office the two managers showed him a similar petition stating the employees do not want to be represented by the Union and both said he should sign it. Chacon said he had already signed the petition but they said it had been ripped up and they were keeping it in their office and calling people in to sign it. Felix also told him that the Company could have fired him when he didn't have his immigration papers in order but they didn't. The managers told him he'd be better off without the Union. Chacon did not sign at the time.

Another employee, Elizabeth Guzman, entered the office, and in Chacon's presence was asked to sign the petition by Felix and Hilda and did so, and then remained. Another employee, Carlos Rameros, was called into the office and also asked to sign by Felix and Hilda. They also told him that he was a probationary employee and could be let go within 3 months for any reason. Carlos signed the petition and left. Another employee, Alan Jimenez, came into the office. Felix and Hilda told him the Union was no good. A meat department employee, Lee Jung Jin, came in to the office. Hilda showed him the petition and asked him to sign it. He asked if his signing would get him a raise and the managers laughed. Lee signed the petition and left. Neither he nor Ji-

menez signed the petition that day. Chacon signed the petition on February 7 when asked to do so by Nancy Guillen, head cashier, a very good friend of Hilda Solari.

Respondent did not call Solari as a witness in its defense. Thus, the statements attributed to her and to Gonzalez made in her presence, unlawfully soliciting and pressuring employees to sign the decertification petition, remain undisputed by her on the record. Similarly, although Respondent called Felix Gonzalez as a witness in its defense to the unlawful discharge allegation on behalf of employee Abraham Martinez, Respondent did not ask him, and, consequently, he did not dispute the unlawful solicitations attributed to him by witnesses Jimenez and Chacon.

Apart from the foregoing, I find that Jimenez' narrative is highly credible and that he testified in a straightforward and thoughtful manner, was comprehensive and direct in his answers as well as frank in his acknowledgment of his lack of respect for both Kudo and Rodriguez in their dealings with employees, sentiments and views which I conclude do not diminish his credibility as a witness. Jimenez' and Chacon's testimony—in the case of Chacon derived from his pretrial affidavit—are mutually corroborative of the coercive conduct of Yaohan's supervisors and managers in soliciting and threatening employees to support the decertification petition and campaign among the Edgewater facility's employees.

C. *The Evidence Regarding the Employer's Discharge of Employee Abraham Martinez*

Abraham Martinez testified that he began working for Respondent on September 2, 1988, as a produce clerk at its food-retail specialty store in Edgewater, New Jersey. The facility opened for business later that month. He was fired on April 19, 1994, allegedly for stealing a single bottle of soy sauce, with a retail value of $2.99. He had never before been disciplined by Respondent. His work hours while employed were 7 a.m. to 4 p.m. His immediate supervisor was Piochi Endo, department manager. Under Endo, and also Martinez' superior, was Eroki Fukyshige, assistant produce department manager.

Martinez was among the top 10 employees in seniority at the Edgewater facility, which employed upwards of 60 employees. He and another long-time employee, Gerardo Rodriguez, had been entrusted with sets of keys to open the facility at 7 a.m. and shut off the alarm 2 to 3 days a week.

Martinez was a member of Local 1245 since it became the Edgewater employees' bargaining agent in 1990.

At the end of January or beginning of February 1994, an employee named Victor Guitterez showed him a petition to remove the Union and asked him to sign. Martinez refused, saying that the only protection the employees have is the Union and we are supposed to support it. In the same period of time, Martinez spoke to more than 50 percent of the employees, individually and in groups, in the cafeteria and on the work floor, telling them the same thing, that they should support the Union because ''that's the only protection we have.'' A number of these employees approached him about the matter of the Union and the question of its retention or removal as their representative because of his age and seniority as an employee.

A couple of weeks after Guitterez had approached him to sign the petition, Martinez went to see Personnel Manager Felix Gonzalez to ask if he could make copies of some personal papers for Martinez. Gonzalez told Martinez that when he needed something from the Company he asked Gonzalez. When the Company needs him (to do something) he never does it. Martinez replied, ''[W]hat the Company needs from me it's my job and I get paid for that.'' Gonzalez said, ''[O]kay'' and then made the copies for Martinez. Previously, Gonzalez had honored many requests from Martinez for reproduction of personal papers and had never made such a remark.

Martinez also testified to a conversation he held with Jung Ho Kim, a manager of oriental groceries, around lunchtime in the lunchroom, a couple of weeks later. Martinez was seated at a table with employees Gerardo Rodriguez and Santos Chacon. At an adjoining table were Kim, who is Korean, and a few other Korean employees. Martinez heard Kim and the others, who had been conversing in Korean, now speaking in English. He heard Kim say the Union ''only needs you to get your money and not do nothing [sic] for you.'' Martinez spoke up and said, ''Your [sic] wrong because the Union is the only support we have.'' Kim responded ''[Y]ou don't know nothing [sic].'' Martinez replied, ''You don't know nothing [sic] because your with the Company. Your a brown nose.'' Martinez later explained he used this expression to describe Kim's conduct of suggesting employees sign the petition to remove the Union.

After this exchange, the relationship between Martinez and Kim, which up to that time had been cordial, with an invariable exchange of greetings and social banter, became strained. Kim now never answered when Martinez greeted him at work. Kim now also watched Martinez closely at work.

Martinez also described a practice under which employees were able to take home free, damaged goods. A week or two before his discharge Martinez was granted permission by his supervisor, Eroki Fukyshige, to take home some bouillon cubes. On that occasion Fukyshige asked Martinez if he wanted the cubes. Martinez said he did. Fukyshige then placed the cubes in a company bag and signed the bag authorizing Martinez to remove the items from the facility. Earlier on the day of his discharge, before lunchtime, Fukyshige gave Martinez two heads of lettuce for his personal use and signed the bag for their removal. Such damaged goods removed from the customer display shelves are usually placed by a supervisor on a table in the back produce room which contains a freezer/refrigerator, and a number of tables on which are stored wrapping machines and a weighing scale and where employees can examine them and arrange to remove them.

On April 19, 1994, before leaving work at 4 p.m., in accordance with his usual custom, Martinez went into that back room, removed his lunch bag from the refrigerator, placed it on the table holding the scale, went upstairs to punch the timeclock, and then returned to the produce room to gather his lunch bag, and the lettuce bag, before leaving the facility. On this occasion on his return to the back room before leaving work, Martinez saw a plastic bottle containing soy sauce sitting on the table. Martinez picked it up with the thought of receiving permission to remove it. Just then Fukyshige ran by him on his way upstairs and Martinez called out his name and walked a short distance in his direction. Fukyshige did not respond and continued quickly on his way up the stairs. The time which elapsed from Martinez finding the bottle,

holding it, and calling after Fukyshige was only a matter of seconds.

While all of the foregoing events transpired Martinez had seen Assistant Produce Manager Kim about 15 feet away from him, on the other side of a glass partition, talking on the telephone. In the seconds while Martinez was still holding the bottle and after Fukyshige had left the area, Kim called out to Martinez, ''Abraham, don't do that'' and Martinez replied, ''Listen, what are you thinking Mr. Kim, I'm not going to lose my job for $1.99.'' Martinez believed Kim was joking. Martinez then put down the bottle, took his lunch bag and lettuce bag and started out the facility to his car. On his way, Kim called after him, not to go away. After placing the bags in his car, Martinez returned and shortly Gonzalez was called downstairs and the three then discussed Kim's accusation that Martinez was stealing or was trying to steal the soy sauce. Within a short time the three went upstairs to the conference room where they were joined by Endo and Kudo. Martinez spoke with Gonzalez in Spanish. He explained he believed the bottle was damaged, so he was going to ask Fukyshige to sign it out for him. When asked why he thought the bottle was damaged, Martinez explained the Company never puts any goods in the back room that were not damaged and he found the bottle on a table there. Much of the interchange among the officials and even some questions or statements put to Martinez were in Japanese and Martinez, not understanding them, objected to this practice.

The company officials finally produced a paper and told Martinez to sign it. At first, Martrinez resisted but then as the company officials continued to urge him, Martinez signed, but added an explanation. Martinez was told he was terminated that day, and Respondent has not offered him his job back.

The form given to Martinez was a separation notice listing at the top the date, name, department, supervisor, hire date, and last day worked for Martinez. In the remarks area, after listing the separation as a discharge, is written: ''Was apprehended by Mr. Kim Jung Ho—(Ass't Store Mgr.), stealing a bottle of soy sauce, on 4/19/94 at approximately 4:05 p.m.'' The original time of 4 p.m. had been crossed out. This was listed as unacceptable conduct. Martinez signed and dated the form and above his signature wrote: ''I signed that for not disobey [sic] order mi [sic] boss but I not steeling [sic] nothing for [sic] that Company. I sure Mr. King [sic] have something against Spanish people.'' Endo signed as manager and the discharge was approved with Kudo's signature.

When asked on cross-examination whether he agreed that the soy sauce bottle was not damaged, Martinez noted that the label was damaged and looked melted. He had not retained the lettuce bag containing Fukyshige's signature. Neither did Martinez show Kim that bag or tell him about it. While he had told Kim Spanish people don't use soy sauce, he intended to use it if the Company gave it to him.

It was Martinez' feeling that Kim treated Spanish employees unfairly and those employees had shared similar feelings with him.

The bag in which Martinez stored his lunch was 10 inches high, as was the soy sauce bottle, in Martinez' estimation.

Two other witnesses corroborated Martinez' protected concerted conduct in opposing the decertification petition and in supporting the Union, and in the one instance described by Martinez, one of the two witnesses supports a finding that Yaohan obtained knowledge of Martinez' conduct in this regard.

Jimenez testified that in conversations with Martinez about the circulating petition to remove the Union, Martinez told him he was very much in favor of sticking with the Union, that he had refused to sign any petition, and that he would do whatever he could to make sure that the Union stayed because he felt safer with the protection that the Union offered him. This testimony is credited.

In an affidavit received in evidence by stipulation in lieu of his testimony, employee Gerardo Rodriguez swore that Abraham Martinez told him on a few occasions during the period when a petition to get rid of the Union was going around that he thought that the employees needed a union and that it gave them protection. Rodriguez and Martinez took breaks together and Martinez often spoke out in support of the Union to him and in front of other employees while he was working and on break.

Rodriguez recounted his recollection of the incident in the lunchroom when he was seated with Martinez and other Hispanic employees while Grocery Manager Kim was seated at another nearby table talking to some Korean employees. He heard Abraham tell the Korean employees that they shouldn't listen to Kim, he is a company man and a ''brown-nose,'' and that they needed a union and the Union gives them protection. He said this in front of Kim.

Rodriguez also corroborated Martinez' testimony about a recognized practice of allowing employees to take home damaged goods. Rodriguez noted that sometimes damaged goods were left in the back room on a table and the produce department assistant manager, Fukyshige, would let employees take them home for free. It would be put in a bag and he would initial the bag. Sometimes Rodriguez took stuff home this way.

Respondent called Kim and Gonzalez in defense to the allegation of Martinez' discriminatory discharge.

Kim testified that on the day of Martinez' discharge he had received an outside telephone call and had been paged to answer. He picked up the phone in front of the security office on the first floor. The employees were just finished working at about 4 p.m. As he was finishing the call he saw Abraham Martinez coming toward the produce department. Through a glass partition he saw Martinez go into the room with the refrigerator to get his empty lunch box. He saw Martinez lean over the scale on one of the tables, pick up a soy sauce bottle, and, as he was half turned away from Kim, put it in his shoulder bag and as he was zipping up the bag, Kim spoke up and asked Abraham, ''[W]hat are you doing.'' After Kim said that, Martinez, who, by now had turned toward Kim and was walking in his direction, now walked away from him and went behind an area into which Kim's view was blocked, but where Kim believed Martinez now removed the bottle and left it on a counter near the stairway leading upstairs. As Martinez shortly emerged and started out the store he angrily said to Kim he wasn't going to steal anything. He, Martinez, was carrying two bags. Apparently, although Kim did not initially so testify, Martinez returned to the store at Kim's request after leaving the bags in his car.

Martinez and Kim now had a discussion about what Kim had witnessed. Martinez told Kim that the bottle of soy sauce

was damaged goods, therefore he had the permission of the manager to take it home. Kim said, ''Okay, if that's the case then why don't you show me the bottle and that it was damaged.'' They both went to view the bottle left on the rear counter. Kim pointed to a bottle on the counsel table as the one they both had viewed, and the one that Kim had retained in a drawer until giving it to Respondent's counsel sometime before the hearing. The parties stipulated that bottle was between 10-3/4 and 11 inches high, was made of plastic, contained a soy sauce with a brand name of Hi Maru appearing on a slightly torn label with Japanese and English writing placed on the neck of the bottle and had an orange twist off cap.

While viewing the bottle, Kim said is this really damaged goods here, is this bottle damaged. Martinez now changed his story. He said he thought it was damaged, that's when he was going to take it home. Although Kim saw the bottle was not damaged—Respondent claimed the slight tear on the label occurred later when it was being placed in a draw (sic)—he called the office for further consultation. At this point Felix Gonzalez came downstairs, checked the bottle himself and the three of them continued to talk, with Martinez and Gonzalez talking at times with each other in Spanish.

Kim explained he became angry because of Martinez' changes in his explanations, about the condition of the bottle as well as a claim that he had permission from the produce department manager to take the bottle which Kim said was denied by Manager Fukyshige.

Kim denied having any knowledge of the Union or whether Martinez supported or opposed the petition to throw out the Union. Kim could not remember an argument with Martinez in the lunchroom. He did testify to a practice of Spanish-speaking employees eating together and Korean employees separately sitting and eating together and that his name, Kim, was spoken and that he, referring to Martinez, will look at him and their eyes will meet. However, he didn't know what Martinez was saying and to his best recollection didn't think they had any conversation that got into the matter of the Union. He was surprised that Martinez remembered to mention such an argument. However, significantly, when asked again by Respondent's counsel if he discussed the Union with Martinez in the lunchroom, Kim replied, ''The whole hour he was talking about union'' (Tr. 154) but that he didn't talk with Martinez about the Union there. Kim did acknowledge that before January 1994, he and Martinez had a good relationship and joked with each other.

On cross-examination, when asked whether it was possible that while he was on the phone, Martinez could have called out Fukyshige's name but he may not have heard it, Kim replied that he did not see Fukyshige in that vicinity at all from the beginning of the incident. Neither did Kim see Fukyshige later after Gonzalez came downstairs. Yet, Kim had testified earlier that Fukyshige had denied granting Martinez permission to take the bottle home. Such questioning of Fukyshige then would have taken place before Martinez' firing, yet neither Kim, as noted, nor Gonzalez, mentioned Fukyshige as being present downstairs or even upstairs when Martinez was fired and told to sign the separation notice. Neither did Respondent produce Fukyshige as a witness to deny the employees' corroborated testimony that he permitted damaged goods to be taken, that he gave Martinez lettuce earlier on the day of his discharge or that he did not see or hear Martinez call his name at about 4 p.m. as he bolted up the stairs from the produce department. Neither was any explanation ever provided as to why an allegedly undamaged, perfectly sound bottle of soy sauce was placed on a table in a back produce room rather than on a display rack or case available for purchase by customers.

Kim even denied knowing what union means, but then admitted that a union person, John Tricolli, Local 445 representative, was seated next to counsel for the General Counsel at the counsel table. Kim also offered sufficient explanations which established that he was aware of a lot of talk going on at the facility about a union coming in or going out and, further, understands very well the phrase in English, ''Union just takes your money.''

I am not prepared to credit Kim that Martinez placed the soy sauce bottle in his bag with the intent of removing it surreptitiously from the facility. Martinez' discovery of the bottle and his immediate attempt to seek authorization for its removal is a much more logical and reasonable explanation for the bottle being discovered in his possession. The illogical and irrational act from Respondent's point of view of permitting an employee who is observed placing store merchandise in his own bag to thereafter exit the store without being immediately confronted, detained, and fired on the spot makes Kim's version of the events he witnessed essentially unbelievable. It is little wonder that Kim, and later Gonzalez, went to extra lengths to seek to discredit Martinez through alleged but unsupported inconsistencies in his defenses to the theft allegation. If, indeed, Respondent had the ''goods'' on Martinez, an actual witnessing of an act of thievery, rather than the decidedly ambiguous holding of a bottle left in a back room, all the interrogation and claims of Martinez offering inconsistent defenses would have been essentially unnecessary and beside the point. In this connection, Kim's post hoc rationalization that if Martinez had only admitted an honest mistake in believing the bottle was damaged, or told him that he really needed it and therefore thought he could take it, then he would probably have let him have it (Tr. 149), is disingenuous and insincere in the extreme.

I also do not credit Kim that Martinez ever argued or explained that he had permission from Fukyshige to remove the bottle. Indeed, Respondent's next witness on this matter, Felix Gonzalez, admitted, under cross-examination, that Martinez had claimed he was going to go ask Fukyshige for permission, clearly inconsistent with Kim's testimony that Martinez stated he already had received such permission.

Kim's denial of the alleged argument about the Union with Martinez in the lunchroom, in which he claimed lack of recall, but later admitted Martinez talking at length about the Union, was weak and unbelievable. Neither can Kim's feigned ignorance of the Union nor the Company's involvement in the decertification petition drive, shield him from participation in that unlawful activity, knowledge of Martinez' strong antipetition and prounion stance, and ultimately, a successful attempt to remove Martinez from the work force at a time when the RD petition was still pending, and a strong prounion voice among the employees could compromise Respondent's goal of becoming union free.

Felix Gonzalez testified that he was the administration assistant manager for Yaohan at the Edgewater facility. This job encompasses personnel and labor relations responsibil-

ities, among other duties. He speaks Spanish, English, Japanese, and Togalog, a Philippine language. He enforces company policies contained in the employee handbook, formally described as store policy and procedure manual, a copy of which Abraham Martinez acknowledged receipt in writing on June 25, 1993.

The handbook contains a number of provisions relevant to the issues in this proceeding. Paragraph 19, under a heading of General Store Policy provides that ''All employees are not to, in any way, take out company property including salable or non-salable merchandise from company premises without the Store Manager's pre-authorization.'' Under a heading of Employee Conduct, certain conduct is listed which may lead to immediate discharge, in contrast to the progressive discipline program consisting of three levels of discipline for unsatisfactory actions and performance. Under paragraph 3, immediate discharge can result from ''Stealing either from co-workers or from Yaohan or its customers.''

Gonzalez testified and Respondent offered documents establishing that Respondent systematically fired employees for stealing, including, inter alia, theft of funds from a cash register, and apprehension of an employee for seeking to remove meat hidden in his pants which was only discovered on his interrogation. In one instance Respondent sought to establish that one of these employees, Sandra Lopez (described as Ms. Lora in the warning report), who was terminated on July 6, 1994, for stealing of company funds, was known by Respondent to have signed the petition to decertify Local 1245 as the Edgewater employees' bargaining representative. In admitting knowledge of the petition signers, and, further, that Respondent's counsel had retained a copy of the Edgewater petition in his office, the source of witness Gonzalez' knowledge (Tr. 199), a petition originally filed in Region 22 of the Board on February 14, 1994, Respondent was essentially admitting that it had knowledge of Martinez' opposition to the petition drive spearheaded by Respondent (because his name does not appear on it) before his discharge on April 19.

In connection with Martinez' discharge on April 19 Gonzalez was called downstairs by Kim to participate in the interrogation of Martinez. First, Kim spoke to Gonzalez in Japanese, explaining what he had witnessed. Gonzalez volunteered, without being asked, that after he confronted Martinez, Martinez said this was the bottle—the one produced by Respondent for the hearing—that he put in his bag. In a conversation with Martinez in Spanish, Martinez at first could not offer any response to Gonzalez' comment that the bottle didn't appear to be damaged. Yet, Gonzalez admitted, as I earlier noted, that Martinez argued that he wasn't trying to steal it, he was going to ask Fukyshige for permission to take it home, an intention inconsistent with placing the bottle in his bag.

After hearing both sides, Gonzalez felt that Endo, the produce manager, should be notified. Endo came downstairs and Martinez started screaming again, ''I wasn't trying to steal the bottle,'' although according to Gonzalez, who can hardly be believed on this, ''Nobody, up to that point, had actually told him you were trying to steal that bottle.'' (Tr. 191.) At Endo's suggestion, the four of them went upstairs to a storage room where employees went to smoke and eat on breaks.

Upstairs, the interrogation started all over again with the managers asking questions of Martinez in Japanese and Gonzalez translating them into Spanish for Martinez. Martinez now denied placing the bottle in his bag. When Gonzalez confronted him with his earlier admission downstairs that he had placed the bottle in his bag, Martinez thought a while and then responded that he thought he did, but he had just placed the bottle next to the bag under his arm. After Gonzalez explained to the managers in Japanese this change in his story, Kim started screaming that he'd quit his job as of right now if what he is saying is true. Martinez also now said he had never claimed the bottle was broken, but only that he thought it was and that was why he sought out Fukyshige.

Gonzalez now asked at Kim's urging why would Martinez ask Fukyshige since he is not authorized to let you take anything, especially not grocery items because those are under Kim's jurisdiction. Martinez never answered this.

Gonzalez also believed it odd that Martinez would talk about looking for Fukyshige and yet he was heading out of the store to go home after punching out upstairs.

A decision was now made to terminate Martinez. It was Gonzalez' understanding that the bases included Martinez' change in testimony, denying he had placed the bottle in his bag after first admitting it, his false claim that the bottle was damaged, his claim he was looking for Fukyshige, yet heading out of the store, and finally, running out of the store and putting his bags in the trunk of his car after taking the bottle out of his bag and placing it on a table.

None of these alleged inconsistent statements or actions appear in Martinez' separation notice which relies strictly in the theft of the bottle to support the discharge. As to these asserted grounds, Kim never testified that Martinez admitted to him placing the bottle in his bag, although he allegedly saw him do it. It is also apparent that when Martinez explained that he was going to ask Fukyshige for permission to take the bottle home, that this was his intention when he first saw the bottle and picked it up; that intention was clearly thwarted when Fukyshige failed to acknowledge Martinez' attempt to attract his attention and Kim brought Martinez short with his pointed inquiry as to what he was doing. It is also apparent that while Martinez may have initially believed the bottle's label was damaged, with the time provided to reexamine the bottle upon his later interrogation, Martinez now readily agreed that he only thought it may have been damaged. It would have been natural to assume some defect in view of its having been left in the room where damaged goods are kept before being offered to, or asked for by, employees. Gonzalez' fourth ground, the fact that Martinez went to his car to store his two bags before returning at Kim's direction, does not provide any evidence of guilt unless the use of the loaded phrase, ''ran out of the store'' is factored in, and there is no evidence that Martinez did so, that it came up in his interrogation, or that Gonzalez was present to witness Martinez' leaving. Certainly, Martinez never left the store with the bottle, and his having placed it back on the table is consistent with his story of the genesis of the incident.

Incredibly, although Gonzalez had previously testified that the store manager, Kudo, could authorize release to employees of damaged goods, and the employee handbook confirms this, while undergoing cross-examination, Gonzalez suddenly

denied that employees were allowed as part of company policy, to take slightly damaged goods home with permission. Respondent counsel's later attempted rehabilitation through the use of a leading question could not overcome this contradiction. This sudden and complete turnabout in his testimony along with other irregularities noted as well as his inability to deal with employee testimony attributing solicitations of and threats made to employees to sign a decertification petition warrants my finding that Gonzalez' testimony was biased, unbelievable, and untrustworthy. He is not credited as to his version of Martinez' response to his interrogation where it differs from Martinez' own recital.

Analysis and Conclusions

The foregoing presentation of the facts shows that, by its supervisors and agents, Felix Gonzalez and Hilda Solari, Respondent solicited employees to sign a petition to decertify Local 1245 as the collective-bargaining representative of its employees employed at its Edgewater facility. The testimony of General Counsel witnesses describing the solicitations of employees which took place stands uncontested on the record. Such conduct by Respondent clearly violates Section 8(a)(1) of the Act. Soliciting employees to withdraw their support for a union has long been held by the Board to be a per se violation of Section 8(a)(1). *American Linen Supply Co*., 297 NLRB 137–138 (1989); *Texaco, Inc*., 264 NLRB 1132 (1982), enfd. 722 F.2d 1226 (5th Cir. 1984), rehearing denied 729 F.2d 779 (5th Cir. 1984), and cases cited therein.

From the outset, these agents, harping on the futility and financial disadvantages of retaining the Union as their bargaining representative, strongly influenced employee activity to remove Local 1245. Once the initial petition was torn, probably because as noted in testimony it failed to contain a proper heading describing the purpose of the signatures, Gonzalez and Solari went to work, this time retaining the petition in their office and inviting employees in one by one to receive their blatant antiunion message and their urging to sign. By initiating and stimulating the activity that led to the employees' withdrawal from the Union, by proposing the idea of the employee petition, and by providing not only supervisory assistance but supervisory direction and control of the petition-signing process itself, Respondent did far more than merely allow employees to exercise the rights guaranteed them in Section 7 of the Act but actually unlawfully circulated the petition and encouraged employees to sign in violation of the Act. Id. at 1133; *Fort Wayne Newspapers*, 247 NLRB 548 (1980).

But Respondent did not stop at such conduct. By making clear to employees who might have hesitated in positively responding to their entreaties to sign, that their continued employment was subject solely to Respondent's good nature, which could just as easily have come down against them when, e.g., their unprotected immigrant status or their probationary status permitted such adverse decisions, Respondent was coercing employees to sign the petition or suffer discharge. These implied threats independently violated Section 8(a)(1) of the Act and compounded Respondent's unlawful solicitations of decertification petition signatures. *Korea News*, 297 NLRB 537, 540 (1990); *Sherwood Diversified Services*, 288 NLRB 341 (1988); *Justrite Mfg. Co*., 238 NLRB 57, 61 (1978).

I also conclude, based on the credited testimony of Abraham Martinez and Gerardo Rodriguez, that Respondent seized on Martinez' holding of a soy sauce bottle left in the back produce room to forcefully interrogate and ultimately unlawfully discharge him, relying on a sham claim of stealing. The true motive for his termination was Martinez' outspoken opposition to the Respondent-sponsored decertification drive and support for Local 1245's continued status as the Edgewater employee's bargaining representative.

By April 19, Respondent was well aware of where Martinez stood on the decertification drive. Just a month or more prior to that date, Martinez had forcefully defended the Union to Manager Kim's face in front of a group of Spanish- and Korean-speaking employees whose support of the decertification petition had been and was being urgently solicited.

Respondent's knowledge of Martinez' protected conduct is evident from Gonzalez' remarks made to Martinez a few weeks before that confrontation when Gonzalez decried Martinez' lack of support for the petition in words which may have been veiled and indirect but were unmistakable in their impart. I find that Gonzalez in his remarks was making clear to Martinez that his opposition to the Company's goal of ridding itself of the Union was not appreciated and would be remembered and perhaps even be acted upon if the occasion warranted.

The occasion for Yaohan to make good on its implied threat, made earlier to employees solicited by Gonzalez in the office, and on its pointed acknowledgment of a well regarded senior employee's failure to support its antiunion campaign, came on April 19 when Kim saw Martinez holding the soy sauce bottle. It is significant that one manager who took it upon himself to accuse Martinez of stealing and another manager who interrogated Martinez most closely in his own language over the incident had both denigrated the Union and Martinez for his association with it. An ambiguous act for which Martinez provided a reasonable and rational explanation at the hearing was used to cover and shield Respondent's intent to rid itself of a respected senior employee whose known opposition to its decertification solicitations could garner substantial support among the employees if and when a Board-conducted election was held.

On the foregoing analysis, evidence, and factual findings I conclude that the General Counsel has made a prima facie showing that Martinez' protected concerted activity was a substantial or motivating factor in his discharge. See *NLRB v. Transportation Management Corp*., 461 U.S. 393, 400 (1983). I further conclude that Respondent has failed to show by a preponderance of the evidence that it would have discharged Martinez even in the absence of his protected conduct. *Wright Line*, 251 NLRB 1083 (1980), affd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Respondent's recitation of the incidents of past discharges of employees for stealing do not provide any basis for it to avoid responsibility for misapplying its rule of conduct to Martinez in this instance. As noted earlier, it is evident that absent Martinez' outstanding exercise of his Section 7 rights, the incident of April 19 provided little or no basis to take action against him; it was only the extensive interrogation by at least three managers, and which was triggered by two of them who harbored particular antiunion animus and a distaste for Martinez' union adherence, which resulted in the insupportable decision to terminate him.

CONCLUSIONS OF LAW

1. Respondent Yaohan U.S.A. Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1245, United Food and Commercial Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting employees to sign a petition to decertify Local 1245 as the collective-bargaining representative of its employees and by impliedly threatening its employees with discharge if they refuse to sign the aforesaid petition, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

4. By discharging employee Abraham Martinez because of his membership in, support of, and activities on behalf of Local 1245, Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative actions which are necessary to effectuate the policies of the Act.

I shall recommend that Respondent offer Abraham Martinez reinstatement to his former position, or, if no longer available, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings and other benefits he may have suffered as the result of Respondent's unlawful discrimination against him. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2] I shall also recommend that Respondent expunge from its files any references to Martinez' unlawful discharge and notify him in writing that this has been done and that the discharge will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Yaohan U.S.A. Corporation, Edgewater, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to sign a petition to decertify Local 1245, United Food and Commercial Workers International Union, AFL–CIO as the collective-bargaining representative of its employees and impliedly threatening its employees with discharge if they refuse to sign the aforesaid petition.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Abraham Martinez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge of Abraham Martinez and notify him in writing that this has been done and that his discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Edgewater, New Jersey facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit our employees to sign a petition to decertify Local 1245, United Food and Commercial Workers International Union, AFL–CIO as the collective-bargaining representative of our employees and WE WILL NOT impliedly threaten our employees with discharge if they refuse to sign the aforesaid petition.

WE WILL NOT discourage membership in Local 1245, United Food and Commercial Workers International Union, AFL–CIO or any other labor organization, by discharging or otherwise discriminating against our employees in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Abraham Martinez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Abraham Martinez and notify him in writing that this has been done and that his discharge will not be used against him in any way.

YAOHAN U.S.A. CORPORATION

VerDate 12-JAN-99 08:25 Jul 30, 1999 Jkt 183525 PO 00000 Frm 00010 Fmt 0610 Sfmt 0610 D:\NLRB\319\31963 apps04 PsN: apps04